(3)

No. 88-1932

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

GERMAN MUNOZ-FLORES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

CLIFFORD M. SLOAN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether 18 U.S.C. 3013 (Supp. V 1987), which directs sentencing courts to impose monetary assessments on all defendants convicted of federal offenses, was enacted in violation of the Origination Clause of the Constitution, Art. I, § 7, Cl. 1.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 863 F.2d 654. The opinion of the district court (Pet. App. 16a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1988. A petition for rehearing was denied on March 29, 1989. The petition for a writ of certiorari was filed on May 30, 1989 (a Tuesday following a Monday holiday), and was granted on October 2, 1989. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Origination Clause of the United States Constitution, Art, I, § 7, Cl. 1, states:

> All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Section 3013 of Title 18, U.S. Code (Supp. V 1987), as enacted by the Victims of Crime Act of 1984, Pub. L. No. 98-473, Tit. II, ch. XIV, § 1405(a), 98 Stat. 2174-2175, provided:

> **§ 3013. Special assessment on convicted persons**
>
> (a) The court shall assess on any person convicted of an offense against the United States –
>
> (1) in the case of a misdemeanor –
>
> (A) the amount of $25 if the defendant is an individual; and
>
> (B) the amount of $100 if the defendant is a person other than an individual; and
>
> (2) in the case of a felony –
>
> (A) the amount of $50 if the defendant is an individual; and
>
> (B) the amount of $200 if the defendant is a person other than an individual.
>
> (b) Such amount so assessed shall be collected in the manner that fines are collected in criminal cases.

STATEMENT

1. Section 3013 of Title 18 imposes a special assessment on all persons convicted of federal offenses. It was enacted by Section 1405(a) of the Victims of Crime Act of 1984 (98 Stat. 2170-2178), which was part of H.R.J. Res. 648, 98th Cong., 2d Sess. (1984) (Act of Oct. 12, 1984,

Pub. L. No. 98-473, 98 Stat. 1837-2199). H.R.J. Res. 648 contained three Titles: Title I provided continuing appropriations for various government agencies and departments (98 Stat. 1837-1976); Title II enacted the Comprehensive Crime Control Act of 1984 (98 Stat. 1976-2194), of which the Victims of Crime Act of 1984 (98 Stat. 2170) was one of 23 chapters; and Title III established the President's Emergency Food Assistance Act of 1984 (98 Stat. 2194-2199).

The Victims of Crime Act of 1984 created a Crime Victims Fund in the Treasury (§ 1402(a)); authorized federal grants from the Crime Victims Fund to programs for compensating and assisting victims of crime (§§ 1403-1404); enumerated various sources of funding for the Crime Victims Fund, including the special assessments to be imposed pursuant to the simultaneously enacted Section 3013 (§ 1402(b)); and specified that, if the total amount in the Crime Victims Fund exceeded $100 million in any fiscal year, the excess would be deposited in the general fund of the Treasury (§ 1402(c)).[1] The President signed H.R.J. Res. 648 into law on October 12, 1984.

2. In June 1985, respondent and several other persons were indicted in the Southern District of California and charged with aiding the illegal entry of aliens, in violation of 8 U.S.C. 1324. Prior to trial, respondent entered into a plea agreement. Pursuant to the agreement, respondent pleaded guilty to a superseding information charging him with two misdemeanor counts of aiding and abetting aliens to elude examination and inspection by government officials, in violation of 8 U.S.C. 1325. Pet. App. 16a, 31a-32a.

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[1] The provisions regarding the Crime Victims Fund and the grants to state crime victims compensation and assistance programs were codified at 42 U.S.C. 10601-10603 (Supp. II 1984).

In accordance with the government's recommendation, the magistrate to whom the case was assigned suspended imposition of any prison sentence and placed respondent on two years' probation on each count. The magistrate also directed respondent to pay a $25 special assessment on each count under 18 U.S.C. 3013(a) (Supp. V 1987).[2] Pet. App. 16a-17a, 27a-28a.

3. On October 15, 1985, respondent filed a motion under Rule 35, Fed. R. Crim. P.,[3] asking the magistrate to correct an allegedly illegal sentence. Respondent's principal argument was that Section 3013, as enacted, was unconstitutional under the Origination Clause, Art. I, § 7, Cl. 1, because it was a "revenue raising statute that unconstitutionally originated in the United States Senate." Pet. App. 17a. The magistrate rejected the argument and denied the Rule 35 motion. C.A. Excerpt of Record 36-39.

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[2] Section 3013(a) was amended in 1988. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7082, 7085, 102 Stat. 4407, 4408; see Pet. App. 33a-34a (reproducing current version of Section 3013 and identifying amendments to 1984 version). The amendment, which refined the schedule of assessments for misdemeanors and infractions, does not apply in the present case, as the offenses, the prosecution, and the judgment all occurred in 1985. Under the current version of Section 3013, respondent's offenses, which would be Class B misdemeanors (18 U.S.C. 3559 (Supp. V 1987)), would result in assessments of only $10 per count. 18 U.S.C. 3013(a)(1)(A)(ii). The 1988 amendment did not alter the directive in Section 3013(a) that assessments shall be imposed on all persons convicted of a federal offense, and it did not affect the schedule of assessments in Section 3013(a)(2) for felonies.

[3] At the time, Rule 35(a) provided that "[t]he court may correct an illegal sentence at any time." Rule 35 was completely revised effective November 1, 1987, by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, § 215(b), 98 Stat. 2015-2016.

The district court affirmed. Pet. App. 16a-25a.[4] The court observed that it is "well established that the origination clause does not invalidate statutes that are primarily regulatory or penal, but which raise revenue incidentally." *Id.* at 18a. The court concluded that Section 3013 was primarily penal. The court relied on congressional descriptions of the assessments as penal and on *United States* v. *Mayberry*, 774 F.2d 1018 (1985), in which the Tenth Circuit held that Section 3013 was penal for purposes of the Assimilative Crimes Act, 18 U.S.C. 13. Pet. App. 18a-22a.[5]

4. The court of appeals took a contrary view; it held Section 3013 invalid under the Origination Clause. Accordingly, the Ninth Circuit ordered the two $25 assessments to be vacated. Pet. App. 1a-15a. The court first held respondent's Origination Clause challenge justiciable. *Id.* at 2a-4a. The court noted that the text of the Clause does not expressly commit its enforcement to the political branches, and the court concluded that the Clause contains judicially manageable standards. *Id.* at 3a-4a.

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[4] Like the magistrate, the district court rejected not only the Origination Clause challenge but respondent's additional arguments as well – that only one assessment could be imposed because his two offenses arose from a single transaction (Pet. App. 23a-24a), and that no special assessment could be imposed for a petty offense, such as his violation of 8 U.S.C. 1325 (Pet. App. 24a-25a).

[5] The Tenth Circuit held that, because Section 3013 assessments are penal, they are inapplicable to cases arising under the Assimilative Crimes Act, which states that persons who violate state criminal laws in certain areas within federal jurisdiction "shall be guilty of a like offense and subject to a like punishment" (18 U.S.C. 13). In 1987, Congress overruled *Mayberry* by adding subsection (d) to Section 3013, which specified that, for purposes of Section 3013, an offense under the Assimilative Crimes Act is "an offense against the United States" and thus subject to an assessment. See Pet. App. 34a.

Turning to the merits, the Ninth Circuit found that Section 3013 was enacted for the purpose of raising revenue, Pet. App. 6a-11a, and that the bill that became Section 3013 originated in the Senate, not the House. Pet. App. 12a-13a. The court also found (*id.* at 14a) that Section 3013 was not valid under the proviso to the Origination Clause, which states: "[B]ut the Senate may propose or concur with Amendments as on other Bills." The court observed that the Senate may attach an amendment to raise revenue to a House bill only if the House bill itself is a revenue-raising measure within the meaning of the Origination Clause. Here, the court concluded, the Senate added Section 3013 as an amendment to a House bill, but the court found that the House bill was not a bill for raising revenue and thus was not, under its analysis, validly amended by the revenue-raising Senate amendment.

SUMMARY OF ARGUMENT

1. An Origination Clause challenge to the constitutionality of a statute presents a nonjusticiable political question. The House of Representatives is fully capable of enforcing its prerogative under the Origination Clause; indeed, it has done exactly that on numerous occasions by sending legislation back to the Senate if the legislation is not in compliance with the House's origination role. The Origination Clause, moreover, does not extend constitutional protections to the citizenry generally or to some particular class of persons; it simply effects an internal allocation of authority between the House and Senate. The limited role of the Origination Clause suggests that origination is a prerogative of the House over which the House should enjoy the exclusive power of enforcement. Finally, the Origination Clause would be difficult for courts to apply. Courts would inescapably encounter difficulties—and potential disagreements with the House and Senate—in determining which bills are "Bills for raising Revenue" and in defining "origination." The task of making those decisions is more appropriately left by the Article III branch to the House and Senate to resolve in the course of performing their constitutional functions.

2. If the issue is determined to be justiciable, the Court should nonetheless hold that Section 3013 was not enacted in violation of the Origination Clause.

a. Section 3013 was not a "Bill[] for raising Revenue." For purposes of the Origination Clause, "revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." *Twin City Bank* v. *Nebeker*, 167 U.S. 196, 202 (1897). Passed as part of the Victims of Crime Act of 1984, Section 3013 has two primary purposes—assisting victims of crime and adding to the punishment of persons convicted of federal offenses. Section 3013 was not enacted to generate general revenue for the federal government, and thus was not a "Bill[] for raising Revenue" as the Court has interpreted the term.

b. Section 3013 did not originate in the Senate. On October 4, 1984, the Senate added the provision that became Section 3013 to a House joint resolution. Two days earlier, however, the House had passed a separate statute containing precisely the same language thereafter adopted on October 4 by the Senate. Because Section 3013, as ultimately enacted, contained the language that first appeared in the House bill of October 2, the statute is properly viewed as having originated in the House.

c. Even if Section 3013 was a "Bill[] for raising Revenue" and even if it originated in the Senate, the provision should nonetheless be viewed as a permissible Senate amendment of House legislation. The House joint resolution to which the Senate added Section 3013 was com-

prised in major part of appropriations for government agencies and departments. The question whether appropriations bills are within the scope of the Origination Clause is the subject of a venerable dispute between the House and the Senate. Rejecting the Senate's ability to add this kind of amendment to a House bill containing appropriations would both restrict the Senate's amendment power and repudiate the House's longstanding view that appropriations bills are "Bills for raising Revenue." If it is necessary to reach this aspect of Origination Clause analysis, the Court should avoid entanglement in the longstanding dispute between the House and Senate and hold that the Origination Clause will not invalidate a Senate amendment to a House bill that includes appropriations.

ARGUMENT

I. ENFORCEMENT OF THE ORIGINATION CLAUSE PRESENTS A NONJUSTICIABLE POLITICAL QUESTION

The political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n* v. *American Cetacean Society*, 478 U.S. 221, 230 (1986). The nonjusticiability of a political question turns on "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination." *Coleman* v. *Miller*, 307 U.S. 433, 454-455 (1939).

We acknowledge that several considerations militate against a finding of nonjusticiability in this case. First, this Court has entertained Origination Clause challenges on

four occasions in the past,[6] and has discussed the meaning of the Clause on a fifth occasion.[7] Second, the text of the constitutional provisions—"All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills"—does not explicitly state that Congress or the Executive should resolve questions arising under the provision. Cf. *Gilligan* v. *Morgan*, 413 U.S. 1, 6 (1973) (holding that Art. I, § 8, Cl. 16 "is explicit that the Congress shall have the responsibility for organizing, arming, and disciplining the Militia (now the National Guard)"). Third, the general nature of the inquiry, which involves the analysis of statutes and legislative materials, is one that is familiar to the courts and often central to the judicial function.

Despite these considerations, we believe that an Origination Clause challenge presents a nonjusticiable political question. As an initial matter, the Court is in no sense precluded or constrained, by reason of the Origination Clause precedents, from finding nonjusticiability. Not only has the Court never invalidated a statute on Origination Clause grounds, but in three of the four cases adjudicating Origination Clause challenges the Court raised questions about the justiciability of at least some aspect of the claim.[8] Inasmuch as it has never explicitly considered

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[6] *Rainey* v. *United States*, 232 U.S. 310 (1914); *Flint* v. *Stone Tracy Co.*, 220 U.S. 107 (1911); *Millard* v. *Roberts*, 202 U.S. 429 (1906); *Twin City Bank* v. *Nebeker*, 167 U.S. 196 (1897).

[7] *United States* v. *Norton*, 91 U.S. (1 Otto) 566 (1875).

[8] See *Rainey* v. *United States*, 232 U.S. at 317 (Court's decision does not "intimat[e] that there is judicial power after an act of Congress has been duly promulgated to inquire in which House it originated for the purpose of determining its validity" and assumes "for the sake of the argument that such power may be invoked"); *Flint* v. *Stone Tracy Co.*, 220 U.S. at 143 ("In thus deciding [that there is no

the applicability of the political question doctrine to the Origination Clause, the Court can appropriately conclude that Origination Clause challenges are nonjusticiable without the need to reconsider any of its prior decisions.

1. The most persuasive factor suggesting nonjusticiability is "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government." *Baker* v. *Carr*, 369 U.S. 186, 217 (1962). The Origination Clause accords the House of Representatives the responsibility to initiate "Bills for raising Revenue." The House is also vested, through the requirement of bicameralism (Art. I, § 7, Cl. 2), with absolute power to enforce its prerogative. That power is not merely theoretical. On repeated occasions over the past two centuries, the House has enforced its prerogative to originate "Bills for raising Revenue" by voting to return to the Senate various bills determined by the House not to be in compliance with that constitutionally ordained procedure.[9] The House has also em-

Origination Clause violation] we do not wish to be regarded as holding that the journals of the House and Senate may be examined to invalidate an act which has been passed and signed by the presiding officers of the House and Senate and approved by the President and duly deposited with the State Department."); *Twin City Bank* v. *Nebeker*, 167 U.S. at 203 (Court's "interpretation of the statute renders it unnecessary to consider whether * * * the journals of the two Houses of Congress can be referred to for the purpose of determining" the origination of a statute).

[9] See, *e.g.*,132 Cong. Rec. 26,202 (1986); 131 Cong. Rec. 25,418 (1985); 129 Cong. Rec. 12,486 (1983); 125 Cong. Rec. 31,517-31,518 (1979); 117 Cong. Rec. 12,991 (1971); 111 Cong. Rec. 11,149-11,150 (1965); 108 Cong. Rec. 23,014-23,015 (1962); 106 Cong. Rec. 15,818-15,819 (1960); 81 Cong. Rec. 2,930 (1937); 69 Cong. Rec. 1,529-1,530 (1928); 66 Cong. Rec. 2,941-2,965 (1925); 39 Cong. Rec. 2,730-2,736 (1905); 7 Cong. Rec. 4,606-4,613 (1878); Cong. Globe, 41st Cong., 3d Sess. 791 (1871); Cong. Globe, 35th Cong., 2d Sess. 1,666-1,667 (1859).

bodied its view of its prerogative in its formal precedents and procedures.[10] The House clearly "has resources available to protect and assert its interests," *Goldwater* v. *Carter*, 444 U.S. 996, 1004 (1979) (Rehnquist, J., concurring in the judgment), and it has repeatedly deployed those resources to enforce its role in originating revenue bills.

What is more, the House precedents treat the question of origination as one for members of the House to raise according to standards established over time through practice within the House. See, *e.g.*, 6 C. Cannon, *Cannon's Precedents of the House of Representatives* § 314, at 448 (1935) (Origination Clause objection untimely after bill had gone to conference); *id.* at § 315, at 448-449 (discussing standard applied by the House for determining when a bill is one "for raising Revenue"); 2 A. Hinds, *Hinds' Precedents of the House of Representatives* § 1491, at 954 (1907) (discussing untimeliness of Origination Clause objection). In considering a particular piece of legislation, the House relies on its own interpretation of the Origination Clause to determine whether to exercise its authority to object, on Origination Clause grounds, to proposed legislation.

A contrary conclusion—that Origination Clause challenges are justiciable—puts individual litigants in the role of surrogate House Parliamentarians, second-guessing determinations made by the House itself and asserting the prerogative that the House declined to assert. That conclusion similarly propels courts entertaining those challenges

[10] See H.R. Doc. No. 279, 99th Cong., 2d Sess. 43-44 (1987) ("Constitution, Jefferson's Manual, and Rules of the House of Representatives"); 3 L. Deschler, *Deschler's Precedents of the United States House of Representatives*, ch. 13, § 3 (1974); 6 C. Cannon, *Cannon's Precedents of the House of Representatives*, ch. 180 (1935); 2 A. Hinds, *Hinds' Precedents of the House of Representatives*, ch. 47 (1907).

into the odd—and unseemly—role of courts of parliamentary review. When it passes legislation, the House has thereby determined that its right of origination has not been violated, and that its procedures for enforcing the right need not be invoked. For the courts to instruct the House, after the fact, that it was wrong in concluding that its right of origination was not violated would surely express "lack of the respect due coordinate branches of government." *Baker* v. *Carr*, 369 U.S. at 217.

This is not a setting in which there is a compelling call for courts to exercise their traditional authority to construe provisions of the Constitution. In particular, it is not a case in which the rights of a citizen or a class of citizens are affected by the resolution of the constitutional question at issue. Compare *Powell* v. *McCormack*, 395 U.S. 486, 547-548 (1969). The Origination Clause affords no direct protection to individual citizens, and it does not ensure the citizenry as a whole that legislation will receive the consideration of both Houses of Congress and the President. Because the Origination Clause involves strictly a matter of sequence, a statute that has been passed in violation of the Origination Clause is not the product of any constitutional omission. Unlike a violation of the principles of bicameralism and presentment (cf. *INS* v. *Chadha*, 462 U.S. 919 (1983)), an Origination Clause violation does not deprive the citizenry of the participation of both Houses of Congress and of the President. Similarly, unlike a determination that congressional adjournment could shorten the President's time for reviewing legislation (cf. *The Pocket Veto Case*, 279 U.S. 655 (1929)), an Origination Clause violation does not deprive the citizenry of the President's opportunity for full deliberation.

From the outset, the Origination Clause has been a device that affected the relative powers of the two Houses of Congress, not a means by which the Constitution pro-

tects the citizenry from the government. The similar British rule—that money bills must originate in the House of Commons, with the House of Lords entitled only to approve or disapprove those bills—reflected the unrepresentative character of the House of Lords; but that concern was always of limited applicability to our government. See J. Story, *Commentaries on the Constitution* §§ 445, 446, at 315-317 (R. Rotunda & J. Nowak ed. 1987).[11] It is especially so now, with a Senate that is popularly elected. U.S. Const. Amend. XVII. As the court of appeals acknowledged, "diminished concern about the Senate's lack of accountability has largely undermined the clause's rationale." Pet. App. 4a.[12] Thus, respondent cannot seri-

[11] The Framers drew the Origination Clause from the British rule, but like most of the States prior to 1787, they deliberately departed from the British model by, among other things, permitting the Senate to amend House bills for raising revenue. See, *e.g.*, 1 M. Farrand, *The Records of the Federal Convention of 1787* (1966), at 233 (Madison); 2 M. Farrand, *supra*, at 278 (Dickenson); *id.* at 279 (Rutlidge); 3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 376 (2d ed. 1836) (Madison).

[12] Some of the Framers believed that, even as a matter of sequence and internal allocation of responsibility, the origination privilege did not create a meaningful distinction between the House and Senate. See 1 M. Farrand , *supra*, at 535 (Yates) ("it is nothing more than a nominal privilege"); *id.* at 544 (Wilson) ("[i]f both branches were to say yes or no, it was of little consequence which should say yes or no first, which last"); *id.* at 545 (Pinckney) ("the privilege of originating money bills being of no account"). See also 2 M. Farrand, *supra*, at 297 (Williamson) ("some think this restriction on the Senate essential to liberty—others think it of no importance. Why should not the former be indulged"). To be sure, inclusion of the Clause was of considerable importance to delegates who viewed the House as more representative than the Senate (1 M. Farrand, *supra*, at 544) and to delegates from large States, which would have greater proportional representation in the House than in the Senate (2 M. Farrand, *supra*,

ously contend that the alleged Origination Clause violation has resulted in some injury to him—that the special assessment statute received less attention or was drafted differently because it originated in the Senate instead of the House. Respondent's only interest in the Origination Clause issue is that it provides him a vehicle through which to challenge his sentence. That should not be enough to permit courts to adjudicate Origination Clause claims, which we believe should be left—out of respect for a coordinate branch—to the two Houses of Congress whose interests the Origination Clause affects.[13]

2. Origination Clause challenges should be held nonjusticiable for an additional reason—the Origination Clause raises questions of definition and policy that are very difficult for courts to resolve. See *Baker* v. *Carr*, 369 U.S. at 217. To begin with, it is not easy to formulate judicially manageable standards to determine whether a

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at 514), but these doubts expressed by the Framers, like the text itself, support the conclusion that the Origination Clause should be viewed as no more than a matter of internal allocation between the House and the Senate. Similarly, although the authors of the Federalist papers emphasized the House's origination prerogative as an important attribute of its powers (The Federalist No. 58, at 394 (J. Cooke ed. 1961); *id.*, No. 66, at 498), they also expressed confidence in the House's ability to fend for itself in disputes with the Senate. See *id.*, No. 58, at 393 (House "will have no small advantage in a question depending on the comparative firmness of the two houses"); *id.*, No. 66, at 448 (noting that "the most *popular* branch of every government, partaking of the republican genius, by being generally the favorite of the people, will be as generally a full match, if not an overmatch for every other member of the government").

[13] In a related context, this Court has recognized the nonjusticiability of certain challenges to the "requisite formalities" of legislation. *Baker* v. *Carr*, 369 U.S. at 214. See also *Leser* v. *Garnett*, 258 U.S. 130, 137 (1922); *Harwood* v. *Wentworth*, 162 U.S. 547, 560 (1896); *Field* v. *Clark*,, 143 U.S. 649, 672 (1892).

bill is "for raising Revenue." Thus, for example, the status of a statute that may have revenue implications only in certain years and under certain conditions is by no means free from doubt. The attempt to formulate standards for resolving such a question necessarily forces a court to make complicated fiscal and economic assumptions that may vary from year to year. That sort of effort would require "an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice." *Coleman* v. *Miller*, 307 U.S. 433, 453 (1934).[14] Similarly, it will likely be difficult to formulate judicially manageable standards to determine where a bill "originated." Whether a bill "originates" when it is first introduced, when it is first passed by a house of Congress, or only when it is passed as the first step in the

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[14] The Origination Clause challenges to the Tax Equity and Fiscal Responsibility Act of 1982 are illustrative. Objectors claimed that the initial House version would have decreased revenue, while the Senate version actually increased revenue. Three circuits concluded that a bill that *relates* to revenue is within the reach of the Origination Clause, and that the Act therefore properly originated in the House even if the House version would have reduced revenue (*Armstrong* v. *United States*, 759 F. 2d 1378, 1380-1382 (9th Cir. 1985); *Wardell* v. *United States*, 757 F.2d 203, 205 (8th Cir. 1985); *Heitman* v. *United States*, 753 F. 2d 33, 35 (6th Cir. 1984)); one circuit refused to provide a judicial forum for Congressmen who had unsuccessfully objected to the statute on Origination Clause grounds in the House (*Moore* v. *House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984); *id.* at 956 (Scalia, J., concurring in the judgment)); and one circuit determined that the characterization of the House bill was a nonjusticiable political question (*Texas Ass'n of Concerned Taxpayers, Inc.* v. *United States*, 772 F.2d 163, 165-167 (5th Cir. 1985), cert. denied, 476 U.S. 1151 (1986)). Cf. *Bertelsen* v. *White*, 65 F.2d 719, 722 (1st Cir. 1933) (holding that Section 23 of Merchant Marine Act, 1920 (ch. 250, 41 Stat. 997) is not bill for raising revenue in part because it actually "diminishes the revenue of the government").

direct chain of enactments leading to the final statute are exceedingly fine questions of legislative practice and procedure. For purposes of determining origination, it is unclear whether an omnibus statute should be reviewed in its entirety as one bill, or, in contrast, whether each of its component parts should be analyzed separately to determine their origins.[15] In the ensuing effort to give content to the terms "raising Revenue" and "originate," courts would likely find manageable standards elusive and policy judgments inevitable.

3. To the extent that Origination Clause challenges are deemed justiciable at all, the judicial role in reviewing those challenges should be extremely limited. The same concerns that underlie the political question doctrine sometimes compel judicial deference even if a matter is not found to be a nonjusticiable political question. See *Fiallo* v. *Bell*, 430 U.S. 787, 796 (1977); *Mathews* v. *Diaz*, 426 U.S. 67, 81-82 (1976). For that reason, even if occasions arise in which the Article III branch may properly strike down a statute on Origination Clause grounds, those occasions should, we believe, be limited to the clearest and most unambiguous cases. As we show below, this is surely not such a case.

II. SECTION 3013 DOES NOT VIOLATE THE ORIGINATION CLAUSE

A. Section 3013 is not a "Bill[ ] for raising Revenue" Within the Meaning of the Origination Clause

In order to be subject to the Origination Clause, a bill must be one "for raising Revenue." This Court has given that phrase a narrow interpretation, holding that the

[15] The Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, which occupies more than seven hundred pages in the Statutes at Large (98 Stat. 494-1210), is an example of one such omnibus statute comprised of many independent provisions.

Origination Clause does not apply to legislation that imposes an exaction for a purpose other than raising general revenue.

In *Twin City Bank* v. *Nebeker*, 167 U.S. 196, 202-203 (1897), the Court held that bills for raising revenue "are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." See *Millard* v. *Roberts*, 202 U.S. 429, 436-437 (1906); *United States* v. *Norton*, 91 U.S. (1 Otto) 566, 569 (1875); 1 J. Story, *Commentaries on the Constitution* § 880, at 611 (2d ed. 1851).[16]

The Court's decisions in *Nebeker* and *Millard* demonstrate the narrow scope of the Origination Clause. In both cases, even an assessment labelled a "tax" by Congress was held not to be within the reach of the Origination Clause because in each case the bill was designed to serve other purposes, even though it incidentally generated revenue.

[16] This understanding of the narrow scope of the Origination Clause is supported by its carefully chosen language, which refers not to bills that raise revenue or to revenue-raising bills or to money bills, but to bills "for" raising revenue. This narrow reading is also supported by the debates on the Clause in the Constitutional Convention. See, *e.g.*, 2 M. Farrand, *supra*, at 263 (Randolph) ("He signified that he should propose instead of the original Section, a clause specifying that the bills in question should be for the purpose of Revenue, in order to repel y[illegible] objection agst. the extent of the words '*raising money*,' which might happen incidentally."); *id.* at 273 (Mason) ("This amendment removes all the objections urged agst. the section as it stood first. By specifying *purposes of revenue*, it obviated the objection that the Section extended to all bills under which money might incidentally arise."); *id.* at 276 (Madison) (noting that the term "revenue" is ambiguous, that many measures would have a revenue purpose as well as another, and that it would often be difficult to determine whether raising revenue was the primary one). Earlier drafts of the Origination Clause had referred to "money bills" (1 M. Farrand, *supra*, at 224) and "Bills for raising * * * money" (2 M. Farrand, *supra*, at 14).

In *Nebeker*, the Court rejected an Origination Clause challenge to a provision in the National Bank Act imposing a fee on notes in circulation. The Court concluded that the challenged section was not a "Bill[ ] for raising Revenue" within the meaning of the Origination Clause because it was designed to "meet the expenses attending the execution of the act" and to accomplish the goal of establishing the currency, rather than "to raise revenue to be applied in meeting the expenses or obligations of the Government." 167 U.S. at 202-203. Similarly, in *Millard*, the Court rejected an Origination Clause challenge to provisions levying taxes on property within the District of Columbia in order to finance certain railroad construction activities. Again, the Court determined that the challenged measures were not within the scope of the Origination Clause because "[w]hatever taxes are imposed are but means to the purposes provided by the act." 202 U.S. at 437.[17]

Under this standard, Section 3013 is not a "Bill[] for raising Revenue." It was enacted not to raise general revenue for the support of the government, but for two

[17] Other courts have likewise given the term "Bill[] for raising Revenue" a narrow meaning. See *South Carolina* v. *Block*, 717 F. 2d 874, 887 (4th Cir. 1983) (50-cent deduction imposed on proceeds of milk sales to defray cost of price-support program and to reduce overproduction is not a tax and is thus not within the requirements of the Origination Clause), cert. denied, 465 U.S. 1080 (1984); *Bertlesen* v. *White*, 65 F.2d 719, 722 (1st Cir. 1933) (Section 23 of the Merchant Marine Act of 1920 (ch. 250, 41 Stat. 997) is not a bill for raising revenue); *United States* v. *James*, 26 Fed. Cas. 577, 578 (C.C.S.D.N.Y. 1875) (No. 15,464) (increase in postage rates is not a bill for raising revenue: "Certain legislative measures are unmistakably bills for raising revenue. * * * They draw money from the citizen; they give no direct equivalent in return.").

other purposes—to assist victims of crime and to penalize violators of federal law.[18]

1. As conceived by Congress, the principal function of Section 3013 was to furnish aid to victims of crime. Section 3013 was enacted as one part of an integrated program to provide federal assistance to such victims. Victims of Crime Act of 1984, Pub. L. No. 98-473, §§ 1401-1405, 98 Stat. 2170-2175. As we previously noted, the Victims of Crime Act of 1984 established a Crime Victims Fund; authorized grants from the Crime Victims Fund to victim compensation and assistance programs if they met enumerated criteria (42 U.S.C. 10601, 10602, 10603 (Supp. II 1984)); and directed that special assessments collected under the authority of Section 3013 (along with other specified moneys) be deposited into the Crime Victims Fund (42 U.S.C. 10601(b)(2) (Supp. II 1984)). A measure such as Section 3013 that imposes an assessment

[18] In contrast to the court of appeals here, other courts of appeals considering Origination Clause challenges to Section 3013 have concluded that it is not a "Bill[] for raising Revenue" within the Clause because it was enacted for purposes other than the generation of general revenue. The Third Circuit and the Fifth Circuit have determined that the primary purpose was to aid victims of crime (*United States* v. *Simpson*, 885 F.2d 36 (3d Cir. 1989)); *United States* v. *Herrada*, No. 89-2324 (5th Cir. Oct. 18, 1989)); the Second Circuit has determined that the primary purpose was to increase penalties on lawbreakers (*United States* v. *Griffin*, 884 F. 2d 655 (1989)); and the Sixth Circuit has determined that the primary purpose was both to aid victims and punish law-breakers (*United States* v. *Ashburn*, 884 F.2d 901 (1989)). In contexts outside the Origination Clause, courts of appeals have similarly concluded that the primary purpose of Section 3013 is either to assist victims (*United States* v. *Dobbins*, 807 F. 2d 130, 131 (8th Cir. 1986); *United States* v. *Donaldson*, 797 F. 2d 125, 127 (3d Cir. 1986)) or to punish criminals (*United States* v. *Davis*, 845 F.2d 94, 97 n.2 (5th Cir. 1988); *United States* v. *King*, 824 F.2d 313, 316-317 (4th Cir. 1987); *United States* v. *Mayberry*, 774 F.2d 1018, 1021 (10th Cir. 1985)).

to support a particular governmental program is not a bill for raising revenue, especially since the program that it funds is a remedial one designed to address problems caused by the conduct of the very class of persons on whom the assessment is imposed.

For its part, the court of appeals characterized Section 3013 as a bill for raising revenue because it concluded that Section 3013 assessments imposed under authority of that provision would constitute general income to the Treasury. Pet. App. 8a-9a. That is not so. Although the court below relied principally on the Senate Judiciary Committee's statement that the assessments "will constitute new income for the Federal government," S. Rep. No. 497, 98th Cong., 2d Sess. 14 (1984), that statement lends no support to the court's conclusion. The Committee's observation would equally fit any bill that brought in money to fund a particular government program, such as the currency program in *Nebeker* or the railroad construction program in *Millard*; the statement neither means nor implies that assessments would be available for general governmental expenditures.[19]

What is more, the court of appeals wholly ignored Congress's command, set forth in the same statute containing the assessment provision, that assessments are *not* to be placed in the general fund of the Treasury but are to be deposited in the separate Crime Victims Fund. 42 U.S.C.

[19] The court of appeals also failed to address the significance of the fact that the statement in the Senate Report on which it placed so much weight appears immediately after an explicit statement that "[t]he purpose of imposing nominal assessment fees is to generate needed income to offset the cost" of the victims' assistance fund. S. Rep. No. 497, *supra*, at 13. Thus, in context, the statement clearly means that the assessments would produce "new income" that would be used to support the new victims' assistance program.

10601 (Supp. II 1984).[20] In fact, moneys from that Fund were to be transferred to the general Treasury only if the amount in the Fund reached $100 million (42 U.S.C. 10601(c)(1) (Supp. II 1984)).[21] Even if excess amounts are eventually transferred, the character of the assessment provision itself does not change. Nothing in *Millard* or *Nebeker* (or the statutes involved in those cases) indicates that money raised under the programs at issue would under no circumstances be used as general revenue. Hence, the assessment provision is properly viewed as outside the reach of the Origination Clause because it was designed to finance victim assistance programs rather than to raise general revenue.

2. Section 3013 should have been upheld for the further reason that the assessments, like fines and forfeitures, are penal and therefore are not "for raising Revenue." Assessments are imposed only on convicted criminals.

[20] In view of this requirement, the court of appeals' statement that "Congress failed to restrict the use of the monies assessed under section 3013 in any way" (Pet. App. 9a) is clearly wrong.

[21] The $100 million cap has since been raised. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7121(a), 102 Stat. 4419; Children's Justice and Assistance Act of 1986, Pub. L. No. 99-401, § 102(b)(1), 100 Stat. 904. The current ceiling is $125 million through fiscal year 1991 and $150 million for fiscal years 1992 through 1994. § 7121(a), 102 Stat. 4419. According to Justice Department records, the applicable ceiling has been exceeded only once, in fiscal year 1989, when the ceiling was $125 million and deposits into the Fund from all sources totalled between $133 million and $134 million; by statute (Pub. L. No. 100-690, § 7121(a)), the first $2.2 million of any excess is allocated to the judicial branch for certain administrative costs. Deposits into the Crime Victims Fund are from many sources (42 U.S.C. 10601(b) (Supp. II 1984)), and the special assessments under Section 3013 are typically a small percentage of the total deposits. See U.S. Dep't of Justice, Office for Victims of Crime, Office of Justice Programs, *Victims of Crime Act of 1984; A Report to Congress by the Attorney General*, 9-12 (1988).

Assessments vary according to the seriousness of the offense and are imposed as part of each defendant's sentence. Section 3013(b) directs that assessments are to "be collected in the manner that fines are collected in criminal cases." The provision directing that assessments be deposited in the Crime Victims Fund refers to them as "penalty assessments." 42 U.S.C. 10601(b)(2) (Supp. II 1984). And the provision that added Section 3013 to the Criminal Code did so in a provision, Section 1405(a), that was itself labeled "penalty assessment." 98 Stat. 2174.[22] See also *Ray* v. *United States*, 481 U.S. 736 (1987) (concurrent sentence doctrine could not be applied where separate assessments, pursuant to Section 3013, had been imposed on each conviction). Accordingly, in light of its penal purpose, Section 3013 is no more a bill "for raising Revenue" than is a statute imposing criminal fines on convicted defendants.

B. Section 3013 Originated in the House of Representatives

Even if Section 3013 is somehow viewed as a bill for raising revenue, the court of appeals was nonetheless wrong in concluding that the bill that became Section 3013

[22] The Senate's use of "penalty assessments" in a similar but not identical bill (S. 2423, 98th Cong., 2d Sess. (1984); see n.23, *infra*) lends additional support to this view of the statute's purpose. Contrary to the court of appeals' suggestion (Pet. App. 10a-11a), there is no indication that Congress altered its understanding of the purpose of the assessment provision when it used the term "special assessments" in the final version of Section 3013 rather than "penalty assessments," particularly because "penalty assessments" remains as a description of Section 3013 elsewhere in the Victims of Crime Act of 1984 (§ 1402(b)). See also 130 Cong. Rec. H12,084 (daily ed. Oct. 10, 1984) (section-by-section analysis of H.R.J. Res. 648 conference bill) (referring to "penalty assessments collected under 18 U.S.C. 3013"); *id.* at H12,086 (explaining that section 3013 "imposes a financial penalty upon persons convicted of an offense against the United States").

originated in the Senate. The court's conclusion rests on a mistaken reading of the legislative history and on an insufficient appreciation of the "practical construction" (*Nebeker*, 167 U.S. at 202) that is to be given, and has been given by Congress itself, to the Origination Clause.

It is true, as the court of appeals stated (Pet. App. 13a), that the Senate was the first of the two houses to pass an assessment provision. But it was a House version of the assessment provision that was ultimately enacted into law. For that reason, the bill that became Section 3013 is properly viewed as having originated in the House.

In May 1984, Senator Heinz proposed to amend S. 2423, a bill entitled the Victims of Crimes Assistance Act of 1984, by adding a provision allowing for the collection of "penalty assessments." *The Victims of Crime Assistance Act of 1984: Hearing on S. 2423 Before the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 21 (1984). A penalty assessment provision was included as Section 201 of that bill when it was reported by the Senate Judiciary Committee, see S. Rep. No. 497, 98th Cong., 2d Sess. 4, 13 (1984), and the bill containing the penalty assessment provision passed the Senate on August 10, 1984. 130 Cong. Rec. 23,803-23,805. That penalty assessment provision, which was never passed by the House, was different in wording and structure from the bill that ultimately became Section 3013.[23]

[23] Section 201 of S. 2423 stated (130 Cong. Rec. 23,805 (1984)(emphasis omitted)):

PENALTY ASSESSMENT FEES

Sec. 201. Whenever any person is convicted of an offense in any court of the United States, the court shall impose a penalty assessment fee on such person in the amount of –

(a) $25, if the defendant is an individual and the offense is a misdemeanor;

(b) $50, if the defendant is an individual and the offense is a

On September 25, 1984, the House passed H.R.J. Res. 648, the House version of the continuing appropriations resolution for fiscal year 1985. 130 Cong. Rec. 26,837-26,838. The House bill did not at that time contain any assessment provision. See 130 Cong. Rec. H11,970 (daily ed. Oct. 10, 1984) (joint explanatory statement of conference committee). In a separate action on October 2, 1984, the House passed H.R. 5690, 98th Cong., 2d Sess. (1984), a bill entitled the Anti-Crime Act of 1984. Section 1005 of that bill was a penalty assessment provision identical to Section 3013 as it was ultimately enacted. 130 Cong. Rec. 28,574, 28,648. Two days later when the continuing appropriations resolution was before the Senate, the Senate added a penalty assessment provision to that bill as Section 1405 of H.R.J. Res. 648. That provision, however, was not the provision that the Senate had passed in August, but was identical to the penalty assessment provision that the House had passed two days earlier, on October 2, 1984. The continuing appropriations resolution, with the penalty provision included, was passed by the Senate on October 4 and signed into law as Public Law No. 98-473 on October 12, 1984.

From this sequence of events, it is clear that the House of Representatives was the first House to pass the assessment provision that was actually signed into law. What the Senate did on October 4, 1984, was simply to combine two separate House bills into the Senate's version of H.R.J. Res. 648, without making any changes in the House version of the penalty assessment provision. The court of appeals failed to advert to the penalty assessment provision that passed the House on October 2, and for that reason

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felony;

(c) $100, if the defendant is a person other than an individual and the offense is a misdemeanor; and

(d) $200, if the defendant is a person other than an individual and the offense is a felony.

erroneously concluded that the bill that became Section 3013 originated in the Senate.

Where, as here, the House is the first chamber to pass the precise measure in question, the measure should be found to have originated in the House, even though a similar measure had earlier been passed by the Senate. That conclusion also follows *a fortiori* from the well-established prerogative of the House, upon being presented with a Senate-originated bill for raising revenue, to insert the Senate's language into a House bill, pass the new bill, and send it to the Senate.[24] Since the House is at liberty to do that, it may also, upon being presented with a Senate-originated revenue bill, insert a modified version of that bill into a new House bill. And in that setting, the provision in question still must be said to have "originated" in the House even if, as in this case, the Senate combines that bill and another House bill into a single piece of legislation and passes it in that form.

The House bill, H.R. 5690, was not simply a modified version of the earlier Senate-passed measure, S. 2423. It was, rather, an accommodation of S. 2423 and several other measures, including another proposed House bill, H.R. 3498, 98th Cong., 1st Sess. (1983).[25] Congressman

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[24] See generally 3 L. Deschler, *Deschler's Precedents of the United States House of Representatives* §§ 13-18, at 292-314 (1974) (H.R. Doc. No. 661, 94th Cong., 2d Sess. (1974)); 2 A. Hinds, *Hinds' Precedents of the House of Representatives* §§ 1484, 1485, 1495, at 943-945, 967-969 (1907). Without that prerogative, the House could be entirely precluded by the Senate from adopting a given revenue measure if the Senate simply passed it first. That would not only be practically intolerable but would turn the Origination Clause's protection of a House prerogative on its head.

[25] In light of the court of appeals' statement that "[t]he special assessment provision was introduced in the Senate Judiciary Committee" in May 1984 (Pet. App. 13a-14a), it is worth noting that Congressman Rodino introduced H.R. 3498 on June 30, 1983, and that

Rodino explained the origins of the Senate amendments to H.R.J. Res. 648 and hence of the conference bill (130 Cong. Rec. H12,084 (daily ed. Oct. 10, 1984)):

> The other body early last August passed a modified version of the administration bill, and shortly after that I began negotiations with the administration and the leadership of the other body's Judiciary Committee. Those negotiations successfully resolved the differences among the three bills—H.R. 3498, the administration bill, and the bill passed by the other body. I introduced the compromise that we worked out—H.R. 6403—which was also included in the crime package amendments to H.R. 5690 that were approved by the House on Tuesday, October 2. The other body attached the compromise to the continuing resolution, and the House's conferees agreed to accept the language.

In short, the provision that enacted Section 3013 into law originated in the House for purposes of the Origination Clause.

C. The Senate's Action was a Permissible Amendment of a House Bill

The Origination Clause provides not only that "[a]ll Bills for raising Revenue shall originate in the House of Representatives," but also that "the Senate may propose or concur with Amendments as on other Bills." Thus, the Senate's legislative action will not violate the Origination Clause if the Senate action is an amendment to a bill for

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H.R. 3498 is far closer to the enacted bill in language and structure than is S. 2423. See U.S. Dep't of Justice, Office of Justice Programs, *Indexed Legislative History of the Victims of Crime Act of 1984*, at 176 (1985).

raising revenue that originated in the House. In two Origination Clause cases, this Court concluded that the Senate action was a permissible amendment of a revenue bill that originated in the House. In the first case, *Flint* v. *Stone Tracy Co.*, 220 U.S. 107 (1911), the Court considered an Origination Clause challenge to a tax statute on the ground that the Senate had substituted a corporate tax for the inheritance tax that had passed the House. The Court rejected the challenge because the "amendment was germane to the subject-matter of the bill and not beyond the power of the Senate to propose." 220 U.S. at 143. In the second case, *Rainey* v. *United States*, 232 U.S. 310 (1914), the Court similarly rejected a challenge to Section 37 of the Tariff Act of 1909, which was added by the Senate, because "the section was proposed by the Senate as an amendment to a bill for raising revenue which originated in the House." 232 U.S. at 317.

The court of appeals rejected the contention that Section 3013 could be sustained as a Senate amendment because " 'the subject matter of the House bill in this case was crime control—not raising revenue' " (Pet. App. 14a) (quoting the district court's opinion). This statement reflects a misreading of H.R.J. Res. 648. H.R.J. Res. 648, as it passed the House, provided continuing appropriations for various government agencies, as well as a version of the Comprehensive Crime Control Act of 1984, which had been adopted immediately prior to passage of the continuing resolution. See 130 Cong. Rec. 26,780-26,836 (1984). The Senate then added many amendments, including the Victims of Crime Act of 1984 (and the provision establishing Section 3013). 130 Cong. Rec. S13,520-S13,544 (daily ed. Oct. 4, 1984). The court of appeals' conclusion that H.R.J. Res. 648 related only to crime control thus ignored the fact that it was also a continuing appropriations resolution.

The question whether appropriations bills are "Bills for raising Revenue" within the meaning of the Origination Clause has been the subject of vigorous dispute between the House and the Senate. See generally 3 L. Deschler, *Deschler's Precedents of the United States House of Representatives* § 20, at 331-340 (1974). The House has insisted that appropriations bills are within the scope of the Origination Clause.[26] The Senate has equally insisted that such bills are not within the scope of the Origination Clause;[27] it has acceded to the practice of House origination of appropriations bills, but has emphasized that the practice is not required by the Origination Clause.[28]

We do not ask the Court to endorse either view; rather, we suggest that the Court not allow an Origination Clause challenge to invalidate a provision contained in a Senate amendment to a House appropriations bill. To hold, as a matter of constitutional mandate, that the Senate may not amend an appropriations bill with a revenue-related amendment would both deprive the Senate of amendment power and repudiate the House's settled view of its powers

[26] See, *e.g.*, 108 Cong. Rec. 23,014 (1962) (Rep. Cannon) (Senate's "joint resolution is an infringement on the privileges of the House, as stated in section 7 of article I of the Constitution, under which the House of Representatives has always maintained the right to originate the appropriations bills. The priority of the House in the initiation of appropriation bills is buttressed by the strongest and most compelling of all rules, the rule of immemorial usage").

[27] See, *e.g.*, S. Doc. No. 17, 88th Cong., 1st Sess. (1963) ("The Authority of the Senate to Originate Appropriation Bills").

[28] See S. Doc. No. 17, *supra*, at 1 ("[F]or the most part, the Senate has acquiesced in the position of the House and, as a matter of practice and procedure, all appropriation measures do originate in the House of Representatives. This, however, is a matter of practice and not of constitutional right").

regarding appropriations bills.[29] To the extent that Origination Clause challenges to congressional determinations of sequence and priority are justiciable at all, the standards for evaluating those challenges surely do not require such a disruptive intrusion into congressional practices.

Sustaining the court of appeals' conclusion that the Senate amendment violated the Origination Clause would require this Court to hold either that the appropriations feature of H.R.J. Res. 648 was of no moment, or that the Senate may not add a revenue-related amendment to a House appropriations bill. In order to avoid entanglement in the venerable dispute between the House and the Senate over the origination of appropriations bills, the Court should reject both alternatives and hold that the Senate amendment to a House bill that contained appropriations provisions will not be invalidated as an impermissible exercise of the Senate's amendment powers under the Origination Clause.

[29] There may, of course, be internal congressional constraints on the extent to which the Senate can add revenue-related amendments to House appropriations bills. See, *e.g.*, H.R. Doc. No. 279, *Supra*, at 570-574 (Rules of the House of Representatives, Rule XX, cl. 2; Rule XXI, cl. 2).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
WILLIAM C. BRYSON
Deputy Solicitor General
CLIFFORD M. SLOAN
Assistant to the Solicitor General

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